No. 89-609 (4)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

DONALD and ERNA PUCKETT;
FRED and VIRGINIA SLAWSON,

Petitioners,

vs.

NATIVE VILLAGE OF TYONEK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF DONALD & ERNA PUCKETT AND FRED & VIRGINIA SLAWSON TO PETITION FOR A WRIT OF CERTIORARI

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January 24, 1990

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NOTICE OF SUPPLEMENTAL DECISION OF THE NINTH CIRCUIT

COME NOW Petitioners Donald and Erna Puckett, by and through their attorneys Jermain, Dunnagan & Owens, P.C., and Petitioners Fred and Virginia Slawson, by and through their attorneys Ashburn & Mason, and supplement their Petition to the Court for a Writ of *Certiorari*, noting a change in the status of the Ninth Circuit decision below (No. 87-3569, No. 87-3587, and No. 87-3588). The Ninth Circuit, since the filing of the Petition for Writ of *Certiorari*, has noted the decision below for publication with the addition of a paragraph regarding the appeal of the Kaloas and Constantines in that action. Copies of the decision noted for publication are attached as Appendix to this supplemental pleading.

RESPECTFULLY SUBMITTED,

JERMAIN, DUNNAGAN & OWENS, P.C.

RANDALL G. SIMPSON
Of Attorneys for Petitioners
Donald and Erna Puckett

ASHBURN & MASON

JULIAN L. MASON
Of Attorneys for Petitioners
Fred and Virginia Slawson

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF TYONEK, *Plaintiff-Appellee,* v. DONALD PUCKETT, and ERNA PUCKETT; FRED SLAWSON, and VIRGINIA SLAWSON, *Defendants-Appellants.*	No. 87-3569 D.C. No. CV-82-369
NATIVE VILLAGE OF TYONEK, *Plaintiff-Appellant,* v. DONALD PUCKETT; ERNA PUCKETT; ALEXANDER KALOA; ESTER KALOA; FRED SLAWSON; VIRGINIA SLAWSON; ALEC CONSTANTINE; OLGA CONSTANTINE, *Defendants-Appellees.*	No. 87-3587

NATIVE VILLAGE OF TYONEK,
Plaintiff-Appellee,

v.

DONALD PUCKETT, and ERNA PUCKETT; FRED SLAWSON, and VIRGINIA SLAWSON,
Defendants,

and

ALEXANDER KALOA; ESTHER KALOA; ALEC CONSTANTINE; OLGA CONSTANTINE,
Defendants-Appellants.

No. 87-3588

ORDER AND OPINION

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald, District Judge, Presiding

Argued and Submitted—January 5, 1988
Submission Vacated November 28, 1988
and Resubmitted August 8, 1989
Seattle, Washington

Memorandum Filed August 11, 1989
Order and Opinion Filed November 24, 1989

Before: Eugene A. Wright, Arthur L. Alarcon and
Cecil F. Poole, Circuit Judges.

Opinion by Judge Alarcon

SUMMARY

Indians

The court amended and ordered published an earlier memorandum disposition, affirming in part and reversing in part a judgment of dismissal. The court held that the district court had subject matter jurisdiction over an Indian village's claims against non-members of the village tribe.

Appellee Native Village of Tyonek instituted an eviction action against non-members of the tribe who had leased members' homes in violation of a local tribal ordinance. The district court dismissed, concluding that it lacked subject matter jurisdiction because the claim merely involved the enforcement of a village ordinance which did not involve federal law. The court also dismissed counterclaims and third-party claims on grounds of sovereign immunity.

[1] The application of a tribal ordinance to non-members of a village presents a federal question because the heart of the controversy over the claim is the village's power, under federal law, to enact its ordinance and apply it to non-Indians. [2] In this case, the Village's power to apply its ordinance requires a showing of its authority, under federal law, to enact and enforce the ordinance against non-members of the village. [3] The defendants, however, lacked standing to cross appeal because they were successful in obtaining a dismissal in the district court. [4] Accordingly, the court reversed the dismissal of the eviction suit but affirmed the dismissal as to the counterclaims and third-party actions.

COUNSEL

Bertram E. Hirsch, Floral Park, New York, for the plaintiff-appellant, Native Village of Tyonek.

Robert H. Wagstaff, Anchorage, Alaska, for the appellants Kaloa and Constantine.

Randall G. Simpson, Jermain, Dunnagan & Owens, Anchorage, Alaska, Lewis F. Gordon, Bailey & Mason, Anchorage, Alaska, for the defendants-appellees and cross-defendants-appellants.

Robert T. Anderson, Native American Rights Fund, Anchorage, Alaska, for amicus curiae, Akiachak Native Community. Douglas K. Mertz, Assistant Attorney General of Alaska, Juneau, Alaska, for amicus curiae, The State of Alaska.

ORDER

The memorandum disposition filed August 11, 1989 is redesignated as an authored opinion by Judge Alarcon.

The published disposition will contain the following additional language, which has been inserted prior to the ultimate paragraph:

> The Kaloas and Constantines have no standing to cross appeal because they were successful in obtaining a dismissal of the complaint in the district court. *See Public Service Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939) (per curiam) ("successful party below has no standing to appeal from the denial of an injunction"); *Bryant v. Technical Research Co.*, 654 F.2d 1337, 1343 (9th Cir. 1981) (a party not aggrieved by the district court's order has no standing to appeal).

The petition for rehearing filed August 29, 1989, in case No. 87-3588 by the Kaloas and the Constantines is denied.

OPINION

ALARCON, Circuit Judge.

The Native Village of Tyonek (Village) instituted this action seeking to evict non-members Donald and Erna Puckett (Pucketts), and Fred and Virginia Slawson (Slawsons), from the village. The Village also sought an order enjoining village members Alexander and Esther Kaloa (Kaloas), and Alec and Olga Constantine (Constantines), from leasing their homes to non-members. The Village alleged that the non-members violated Village Ordinance No. 4 and the members violated Village Ordinance No. 65-32.

The Pucketts and Slawsons filed counterclaims against the Village, and third-party complaints against four officers of the Village Council alleging violations of their constitutional and civil rights. The Kaloas and the Constantines moved to dismiss the Village's complaint. The remaining parties moved for summary judgment.

The district court dismissed the Village's complaint concluding the court lacked subject matter jurisdiction under 28 U.S.C. §§ 1331, 1362 and 28 U.S.C. § 2201 (Supp. IV 1986). The court dismissed the counterclaims and third-party claims concluding that the Village is immune from suit under sovereign immunity, and that the officers are protected by derivative sovereign immunity.

The Village appeals from the dismissal of the complaint. The Pucketts and Slawsons appeal from the dismissal of their counterclaims and third party claims. The Kaloas and Constantines appeal from the dismissal of the Village's complaint against them. This court has jurisdiction over each appeal under 28 U.S.C. § 1291 (1982).

The district court concluded it did not have subject matter jurisdiction over the Village's claims against the Pucketts and

Slawsons because the claims merely involved the enforcement of a village ordinance which did not involve federal law. In so holding the district court relied on the rationale of *Boe v. Fort Belknap Indian Community*, 642 F.2d 276 (9th Cir. 1981) which held that the application of a tribal ordinance did not involve a federal question. However, *Boe* is distinguishable from the present situation because *Boe* involved the application of the ordinance exclusively to tribal members.

[1] Significantly, the Village's claims against the Pucketts and Slawsons involve the application of the village ordinance to non-members of the Tyonek village. The rule concerning the application of a tribal ordinance to non-members of a village is expressed in *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1475 (9th Cir. 1989). In *Johnson*, the Chilkat village council sought damages from non-member defendants who removed Chilkat artifacts in contravention of a Chilkat village ordinance. The district court dismissed on jurisdictional grounds. We reversed the dismissal of the claim of the Chilkat Village Council. We held that the district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362. *Johnson*, at 1473. We concluded a federal question existed because "the heart of the controversy over the claim will be the Villages's power, under federal law, to enact its ordinance and apply it to non-Indians." *Johnson*, at 1473.

[2] A similar question is presented in this case. The Village of Tyonek is attempting to apply its ordinance to non-members of the Tyonek village. Pursuant to Ordinance No. 4, the Village is attempting to bar non-members from staying in the village for any period longer than 24 hours unless they receive the Village's permission to remain. As in *Johnson*, the Village's power to apply this ordinance will require a showing of its authority, under federal law, to enact and enforce this ordinance against non-members of the village. *Johnson*, at 1474.

[3] The Kaloas and Constantines have no standing to cross appeal because they were successful in obtaining a dismissal

of the complaint in the district court. *See Public Service Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939) (per curiam) ("successful party below has no standing to appeal from the denial of an injunction"); *Bryant v. Technical Research Co.*, 654 F.2d 1337, 1343 (9th Cir. 1981) (a party not aggrieved by the district court's order has no standing to appeal).

[4] Accordingly we REVERSE the dismissal of the Village's claims against the Pucketts and Slawsons and REMAND those claims to district court. The remaining portion of the district court's judgment is AFFIRMED.